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NO. 85-5487 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner is entitled to have his Fifth Amendment claim considered by federal courts where he failed to raise the claim pursuant to state procedural rules.

2. Whether the Fifth Amendment is implicated when the state introduces testimony of Petitioner's volunteered statement to a private psychiatrist.

3. Whether Petitioner received the effective assistance of counsel during sentencing.

4. Whether the instructions during the sentencing phase were adequate.

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Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Michael Marnell Smith was convicted by a jury on November 2, 1977, of the capital murder and rape of Audrey Jean Weiler. The following day, pursuant to the bifurcated trial procedure, the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's verdict and entered final judgment on November 30, 1977.

The Supreme Court of Virginia granted Smith an automatic appeal, and after full briefing and argument, affirmed his conviction and sentence of death in a written opinion on October 6, 1978. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). This Court denied a petition for a writ of certiorari on May 21, 1979. 441 U.S. 967 (1979).

Smith thereafter filed a petition for a writ of habeas corpus in the trial court. The trial court denied all issues, except the claim of ineffective assistance of counsel, on the

grounds they had been previously decided or were procedurally barred. An evidentiary hearing was conducted by the trial court on November 8, 1979, and the trial court issued written findings of fact and conclusions of law denying Smith's petition on March 14, 1980.

The Supreme Court of Virginia denied Smith's appeal on April 24, 1981, and this Court again denied certiorari on December 14, 1981. 454 U.S. 1128 (1981).

Smith then filed a petition for a writ of habeas corpus in the United States District Court on June 28, 1982. The United States Magistrate issued several reports and recommended the petition be denied. After reviewing Smith's objection to the Magistrate's various reports, the District Court entered an order on December 4, 1984, denying the petition.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in an opinion of May 10, 1985. A petition for rehearing and suggestion for rehearing en banc were denied on June 26, 1985, no member of the Court requesting a poll on the suggestion for rehearing en banc. Petitioner's execution is scheduled for October 24, 1985.

STATEMENT OF FACTS[1]

In the early afternoon of May 23, 1977, Smith left his home and went for a walk on a beach which ran along the James River. He observed Audrey Jean Weiler also walking on the beach. Smith approached Mrs. Weiler, and after a short conversation, placed his arm around her waist and forced her into a wooded area. Smith pulled a knife and forced Mrs. Weiler to disrobe. Despite her pleas to be left alone, Smith raped her. After the rape Smith stated to choke Mrs. Weiler as she begged for her life. When she became limp, he dragged her into the water where he

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[1]Petitioner is not contesting the guilt phase of his trial. Petition, page 5. The facts concerning the offense will therefore be stated briefly to allow the Court to be familiar with the offense.

submerged her head. Smith then stabbed her in the back several times. A medical examination found the cause of death was attributable to three clusters of lethal injury: asphyxia, drowning, and multiple stab wounds.

David F. Pugh was appointed to represent Smith on May 26, 1977, and he immediately requested a psychiatric examination by Dr. Palmaz, who was of the opinion Smith was competent to stand trial. Mr. Pugh requested an additional examination and Smith was hospitalized at the Forensic Unit of Central State Hospital from July 5 to August 23, 1977. Dr. Dimitris diagnosed Smith as having an "inadequate personality," and concluded that he was sane at the time of the offense.

Mr. Pugh then requested the Court to allow Smith to be examined by Dr. Wendell Pile, a private psychiatrist. Dr. Pile diagnosed Smith as a "sexually deviant sociopath." Dr. Pile also reported an incident which had been volunteered by Smith involving an assault on a girl on a school bus.

During the sentencing phase of the trial the Commonwealth called Dr. Pile to relate the school bus incident, and Dr. Dimitris to give his opinion on Smith's competency to stand trial and sanity at the time of the offense. Smith examined each psychiatrist about his diagnosis and presented numerous witnesses in mitigation.

SUMMARY OF ARGUMENTS AGAINST GRANTING CERTIORARI

Petitioner's Fifth Amendment claim is not properly before this Court due to procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977). The district court refused to consider this claim, and the Fourth Circuit avoided confronting this procedural issue since it found that Petitioner was nonetheless not entitled to any relief.

The Fifth Amendment is not implicated in this case, since the testimony complained of came from a private psychiatrist who was not an agent of the state. Estelle v. Smith, 451 U.S. 454

(1981). Furthermore, Petitioner's statement was not the result of any compelling influence but was voluntarily given despite the repeated warnings from his attorneys to remain silent.

Petitioner's sentence of death was based upon two separate and independent aggravating factors, one of which is not challenged. The Fourth Circuit properly concluded Zant v. Stephens, 462 U.S. 862 (1983), controlled the disposition of Petitioner's case. Even if the testimony of the psychiatrist was inadmissible, it related to the history and background of Petitioner and did not inject any misleading, inaccurate or arbitrary factor into Petitioner's sentencing hearing.

Petitioner's attorneys sought out psychiatric evidence in order to establish mitigation, and no evidence has been presented to establish that any such mitigation exists. Counsel's cross-examination of the psychiatrist was for the purpose of laying a foundation to argue to the jury that Petitioner could be helped by treatment.

The jury in Petitioner's case was adequately instructed that they had the power to sentence him to life even if they found the existence of aggravating circumstances. There exists no conflict between the Fourth Circuit's Opinion and other circuits on the question of instructions. This Court has previously rejected this same argument in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), cert. denied, 105 S.Ct. 1855 (1985).

ARGUMENT

I.

PETITIONER'S FIFTH AMENDMENT CLAIM IS BARRED FROM CONSIDERATION UNDER THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72 (1977).

Throughout the federal proceedings in this case, Respondent has consistently maintained that federal courts were barred from consideration Petitioner's Fifth Amendment claim. Respondent asserted this defense since this claim had not been considered by state courts due to a procedural default. Without ruling on the state's default argument, the Fourth Circuit found that Petitioner was not entitled to relief.

During pretrial preparation Petitioner was examined by Dr. Pile, a private psychiatrist. During this examination Petitioner volunteered that while driving a school bus he had assaulted a girl by tearing off her clothes. In the sentencing phase of Petitioner's trial, the Commonwealth called Dr. Pile to relate this bus incident. Petitioner's attorney objected to this testimony but was overruled by the trial judge. (A. 51-54).[2] Petitioner concedes that this issue was not raised on appeal in the Supreme Court of Virginia. (Petition, p. 9).[3]

In Wainwright v. Sykes, 433 U.S. 72 (1977), this Court established the doctrine that federal courts may not take cognizance of constitutional issues which could have been but which were not raised before the state trial court when the state procedural law requires that such matters be raised at trial in

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[2]References will be to the Appendix filed with the Petition and designated (A. _____), and to the Supplemental Appendix filed with this Brief In Opposition and designated (S.A. ____).

[3]Smith notes that this issue was raised and fully briefed by Amicus (Petition, p. 9). The Supreme Court of Virginia was unmistakable in its ruling that it would not consider any arguments by Amicus which had not been raised at trial and not addressed by Smith on appeal. Smith v. Commonwealth, 219 Va. 455, 460, 248 S.E.2d 135, 139 n. 1 (1978). An Amicus cannot expand the issues or arguments raisnd by the parties. United Parcel Service v. Mitchell, 451 U.S. 56, 60 n. 2 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n. 13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960).

order for them to be considered on appeal. This doctrine arose from the Court's concern for comity, federalism and the orderly administration of justice. This Court was of the opinion that the trial itself should be the main event, and federal courts should not be reviewing issues years after the trial when a defendant failed to follow the state's procedural rules.[4]

Virginia has a procedural rule as contemplated in Sykes. Rule 5:21 (now 5:17 and 5:25), Rules of the Supreme Court of Virginia, provided in part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. [Emphasis added].

When a state like Virginia, refuses to review an alleged constitutional error because a defendant has failed to comply with a state procedural rule, then federal courts may not adjudicate such constitutional claim unless there was justifiable cause for the default and actual prejudice resulting from the default. 433 U.S. at 87. The burden of proof for the cause and prejudice prongs of Sykes rests upon the Petitioner.

During the state habeas hearing Petitioner's counsel was asked why the now asserted claim of self-incrimination was not raised on appeal in the Virginia Supreme Court. He responded by saying:

> We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find -- we didn't think at that time there was any merit to that particular claim.

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[4]The Fourth Circuit has held that the Sykes doctrine is applicable when the state's procedural rule requires an issue to be specifically raised on appeal before it can be considered. Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980). Accord Norris v. Wainwright, 588 F.2d 130 (5th Cir. 1979).

(S.A. 1).

Mr. Pugh testified that while he did not personally research any federal law relating to this issue, research was conducted which might have included federal case law. (S.A. 2-3). The results of the research were discussed among counsel, and a decision was made not to raise this issue on appeal. (S.A. 2-3). This process of examining the record to select the most promising issues for review is exactly what this Court has held appellate counsel is expected to do. Jones v. Barnes, 463 U.S. 745 (1983).

This case was tried in November, 1977, and counsel was aware of controlling state authority that Dr. Pile's testimony was admissible. See Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). Counsel felt that the issue would not be successful. (S.A. 3). This Court has held that "[s]ince the cause and prejudice standard is more demanding than Fay's deliberate bypass requirement...we are confident that perceived futility alone cannot constitute cause." Engle v. Isaac, 456 U.S. 107, 130 n. 36 (1982).

Counsel cannot be considered ineffective for not raising this claim on appeal. In its decision in this case the Fourth Circuit noted that "[a]t the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November, 1977, was not certain." (A. 5). Both the Fifth and Eleventh Circuits have held that failure of counsel to anticipate Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), and timely enter an objection to similar testimony did not constitute ineffective assistance of counsel. Gray v. Lucas, 677 F.2d 1086, 1096 n. 9 (5th Cir. 1982), cert. denied, 103 S.Ct. 3099 (1983); Alvord v. Wainwright, 725 F.2d 1282, cert. denied, 105 S.Ct. 355 (1984).

Petitioner's counsel raised 17 issues on direct appeal, and deliberately chose to omit Petitioner's Fifth Amendment claim while pursuing other avenues of defense. "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize

and raise every conceivable constitutional claim." Engle v. Isaac, 456 U.S. 107, 134 (1982).

Petitioner suggests that the Fourth Circuit in choosing to address the merits of this claim, implicitly ruled that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of Sykes. (Petition, p. 15 n. 4). A reading of the Fourth Circuit's opinion does not support Petitioner's assertion. The Fourth Circuit simply chose not to reach the state's claim of procedural default since in the Fourth Circuit's opinion the Petitioner was not entitled to relief. (A. 4-6). The Fourth Circuit specifically noted that the question was very clouded as to whether the representation of trial counsel was, in fact, ineffective or that any prejudice resulted from not having raised this claim on appeal. (A. 7 n. 4). The Fourth Circuit also observed that "there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect." (A. 5). See Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), cert. granted sub nom. Carrier v. Sielaff, 105 S.Ct. 3523 (1985). Such statements by the Fourth Circuit refute Petitioner's assertion that the court implicitly found sufficient "cause" and "prejudice" to satisfy Sykes.

For these reasons Petitioner has failed to establish "cause" for his default on the Fifth Amendment issue and is barred from having his claim adjudicated in the federal courts. The Fourth Circuit should have found that Petitioner's Fifth Amendment claim was barred by procedural default. Under the clear pronouncement in Wainwright v. Sykes, supra, this Court should not consider Petitioner's Fifth Amendment claim.

ARGUMENT

II.

PETITIONER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED.

A. DR. PILE'S TESTIMONY WAS ADMISSIBLE AND DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The record establishes that after Petitioner had been examined by Dr. Palmaz and the Forensic Unit of Central State Hospital, his counsel made the decision to seek a psychiatric evaluation by Dr. Wendell Pile, a private psychiatrist. On more than one occasion counsel advised Petitioner not to discuss prior offenses with anyone. (S.A. 4). After Petitioner returned from Central State Hospital, and before the examination by Dr. Pile, counsel again advised Petitioner not to make any statements about past offenses. (S.A. 5-6). Counsel testified at the state habeas hearing that in view of the repeated advice he had given Petitioner about not discussing prior offenses with anyone, he believed Petitioner would heed his advice. (S.A. 6).

During the initial stages of the examination, Dr. Pile asked Petitioner if he had been involved in any prior sexual episodes. Petitioner advised Dr. Pile that his attorney had warned him not to discuss any incidents which were not related to the present offense. Thereafter, Dr. Pile made no request for such information. At a later time during the examination, Petitioner volunteered the information about the bus incident. (A. 68). On this evidence the state judge found:

> Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

(A. 68).[5]

In Estelle v. Smith, supra, this Court held that introduction of a court-appointed psychiatrist's testimony to

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[5]Although Petitioner was present at the state plenary hearing he chose not to testify. Therefore, the evidence stands uncontradicted.

prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who neither requested the examination nor introduced psychiatric evidence on the issue and who was not warned of his right to remain silent and that any statement he made could be used against him at sentencing, violated his Fifth Amendment rights. Smith is distinguishable from this case. The evidence is clear that, unlike Smith, Petitioner requested the examination by Dr. Pile. Further, Dr. Pile was a private psychiatrist who was selected by Petitioner.[6]

Under circumstances strikingly similar to those present in this case, the court in Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), held that no Fifth Amendment claim existed. In that case the defendant took the stand in his own defense and testified that he was home sleeping off a drunk at the time of the murder. The state called Dr. Niswonger, a psychiatrist who had examined the defendant before trial. Dr. Niswonger testified that during the examination the defendant claimed amnesia concerning the events of the murder. The state then argued to the jury that this testimony contradicted the defendant's alibi that he was home during the murder. The defendant contended that under Estelle v. Smith, Dr. Niswonger's testimony was inadmissible. In rejecting this argument the Eleventh Circuit stated:

> The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in Estelle v. Smith. On the contrary, Smith retained Niswonger (through his trial counsel) to conduct an examination regarding a possible claim of insanity. In such a case, Estelle v. Smith does not require that the psychiatrist give Miranda warnings. The protections of Estelle do not apply unless the psychiatrist is "essentially...an agent of the State...." 451 U.S. at 467.

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[6]Petitioner was the moving party for this examination, but since he was indigent, the trial court entered an order to allow payment to Dr. Pile. Such a circumstance cannot be construed to change this private psychiatric examination into a court-ordered examination referred to in Estelle v. Smith.

741 F.2d at 1258, 1259.

Furthermore, in Estelle v. Smith, this Court reaffirmed that "[v]olunteered statements...are not barred by the Fifth Amendment." 451 U.S. at 469. The state court has found upon the evidence that Petitioner had been carefully advised by his attorney not to discuss with anyone any prior offenses, and that Petitioner clearly understood this warning. (A. 68). Notwithstanding his attorney's advice, Petitioner voluntarily told Dr. Pile about the bus incident. (A. 68).

Under the facts of this case, Petitioner's revelation about the bus incident was given freely and voluntarily without any compelling influence to a private psychiatrist who was not an agent of the state.[7] Under such circumstances Dr. Pile's testimony was admissible and Petitioner's Fifth Amendment rights were not violated.[8]

B. THE FOURTH CIRCUIT CORRECTLY APPLIED ZANT V. STEPHENS, 462 U.S. 862 (1983).

Petitioner asserts that the Fourth Circuit has given too broad a reading to this Court's decision in Zant v. Stephens. In the present case the jury found both the "dangerousness" and "vileness" aggravating circumstances. Petitioner does not challenge the jury's finding of the "vileness" aggravating circumstance. (A. 8), but contends that the admission of Dr. Pile's testimony on the "dangerousness" circumstance precluded the Fourth Circuit from applying Zant.

In Zant the jury having found three separate and distinct aggravating factors sentenced the defendant to death. While the case was on direct appeal the Supreme Court of Georgia held that

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[7]There exists no physician-patient privilege in a criminal prosecution in Virginia. See Gibson v. Commonwealth, supra.

[8]Throughout the Petition the Petitioner seeks to insert a Sixth Amendment claim. (Petition, p. 11-12, 16 n. 5, 24-25, 27-31). These Sixth Amendment arguments were raised for the first time on appeal in the Fourth Circuit and are not properly before the Court.

the aggravating circumstance "a substantial history of serious assaultive criminal convictions" was invalid as being unconstitutionally vague. The Georgia Supreme Court nevertheless concluded that the two other aggravating circumstances adequately supported Zant's sentence of death.

The major focus of this Court in Zant was an examination of the reason the aggravating circumstance had been found to be invalid by the Georgia Supreme Court. This Court found that the aggravating circumstance had not been found invalid for some impermissible reason, such as, treating constitutionally protected conduct as an aggravating circumstance; and concluded that the death sentence need not be set aside as long as at least one valid aggravating circumstance remained.

This was the ruling of the Fourth Circuit in the present case. The Fourth Circuit noted that "[t]he jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty," (A. 3), and that "[t]he testimony in the guilt phase of the case amply provided a basis for decision that the crime was vile." (A. 8). Because of this posture of the case, the Fourth Circuit deemed it unnecessary to examine Petitioner's claim relating to the statement concerning an earlier attack Petitioner described during a private psychiatric interview.

Petitioner argues that such a disposition was incorrect. The thrust of his argument is that the state introduced inadmissible evidence at the sentencing phase through the testimony of Dr. Pile.[9] For the reasons presented in Argument II A, supra, Petitioner is incorrect in his conclusion that Dr. Pile's testimony was inadmissible. For this reason Petitioner's argument fails since it is based upon a false premise, and the Fourth Circuit correctly applied Zant.

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[9]Petitioner's assertion that the Fourth Circuit assumed Dr. Pile's testimony was in fact inadmissible (Petition, p. 16), is not supported by the record. The Fourth Circuit's opinion is silent on this question.

In Zant this Court noted that when responding to the Court's certified question the Georgia Supreme Court stated, "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." Zant, 103 S.Ct. at 2750. (Emphasis added). This observation by this Court is of no benefit to Petitioner for several reasons. This Court in Zant reserved for another day the question of whether a death sentence would be impaired if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information. Zant, 103 S.Ct. at 2748 n. 24. The testimony in this case concerning an earlier attack by Petitioner was neither misleading nor inaccurate.[10] Although this testimony was adduced at the sentencing hearing, where it could have been denied or explained by Petitioner, see Zant, 103 S.Ct. at 2748, it has never been denied nor shown to be inaccurate.

Furthermore, the "dangerousness" aggravating circumstance would not fail even if the testimony relating the earlier attack were to be discarded. The jury had before it evidence that Petitioner had previously been convicted of rape in 1973, and committed this vicious rape and murder not quite four months after his release from serving his sentence for the prior rape. The jury also had before it Petitioner's confession which contained his statement that he killed Mrs. Weiler because "[a]ll I could think about was going back to the penitentiary. I was afraid she could send me back." (S.A. 7). The jury was entitled to infer that Petitioner would kill again whenever necessary to avoid being returned to the penitentiary. It takes an unreasonable view of the evidence to conclude that the jury would not have found the "dangerousness" aggravating circumstance but for the presence of the testimony about the earlier attack. This is especially so in view of the fact that the earlier attack had

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[10]The fact that the contested evidence was neither misleading nor inaccurate disposes of Smith's reliance upon Gardner v. Florida, 430 U.S. 349 (1979). (Petition, p. 17).

occurred some 15 years prior to the murder of Mrs. Weiler and when Petitioner was about 15 years of age.

Other courts when confronted with the claim that a death sentence should be set aside when inadmissible[11] evidence has been admitted during sentencing have concluded that such fact alone is insufficient to warrant such action. The defendant in State v. Campbell, 664 S.W.2d 281 (Tenn. 1984), was sentenced to death upon conviction of murder during a robbery. The jury found three aggravating circumstances, one being that the defendant had been previously convicted of one or more felonies other than the present charge which involved the use or threat of violence to the person. During the appeal the Tennessee Supreme Court found that the State's introduction of convictions for grand larceny and burglary were inadmissible as they were not related to the use or threat of violence to the person. Nevertheless, the Court found the remaining evidence sufficient to support the aggravating circumstance. The court was convinced beyond a reasonable doubt that the admission of this evidence was harmless. Further, the court found the evidence of the other aggravating circumstances overwhelming and in no way dependent on proof of the convictions of the non-violent felonies.

Skillern v. Estelle, 720 F.2d 839 (5th Cir.), cert. denied, ____U.S.____, 105 S.Ct. 224 (1983), presents an analogous situation. During the sentencing phase the state introduced evidence from a forensic pathologist that there was a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. The Texas Court of Criminal Appeals had found this evidence to have been inadmissible because the doctor was incompetent to testify as an expert and lacked firsthand familiarity with the defendant's personality to testify as a lay witness. Nevertheless, the Texas court found the admission of this evidence was harmless due to

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[11]The Respondent has set forth the reasons that the testimony of Dr. Pile was admissible but will assume only for the sake of argument that the contested evidence was inadmissible.

the other evidence of Skillern's violent propensities adduced by the prosecution. The Fifth Circuit concluded that federal habeas relief was not justified since the admission of the prejudicial testimony was not "material in the sense of a crucial, critical, highly significant factor." 720 F.2d at 852.

Contrary to Petitioner's assertion (Petition, p. 22), the affirmance in this case will not allow prosecutors to introduce any and every kind of evidence at sentencing. Introduction of evidence which misleads the jury or injects an arbitrary factor into the sentencing phase can still be dealt with. See Zant, 103 S.Ct. at 2748 n. 23. An example of the application of this principle is found in Evans v. Commonwealth, 228 Va. 468, 323 S.E.2d 114 (1984). Evans had been convicted of capital murder and sentenced to death. His conviction and sentence had been affirmed by the Virginia Supreme Court and certiorari had been denied by this Court. During the proceedings on state habeas corpus it became apparent that many of the records of convictions presented to the jury had been seriously misleading or otherwise defective. The Commonwealth confessed error and acknowledged that Evans' death sentence should be vacated.

The testimony of Dr. Pile concerning Petitioner's admission of an earlier attack was not inherently inadmissible. The background of a defendant is a legitimate area of focus in capital cases. Such evidence did not inject any arbitrary factor into this case such as race, religion, political affiliation, or expressions protected under the First Amendment which were the expressed concerns of this Court in Zant.

The facts in the present case establish that the Commonwealth did not inject into the sentencing phase of Petitioner's trial any misleading or inaccurate information, nor any arbitrary factor which would have impacted upon the sentence of death. Furthermore, the "dangerousness" aggravating circumstance remains sufficient even if the objected to evidence is removed. For these reasons, the Fourth Circuit properly applied Zant to this case.

C. THE TESTIMONY OF DR. PILE WAS INSIGNIFICANT AND DID NOT INFLUENCE THE JURY'S DECISION TO IMPOSE THE DEATH SENTENCE.

Petitioner maintains that Dr. Pile's testimony was demonstrably prejudicial, but fails to compare it to the remaining evidence which was before the jury on the issue of "dangerousness." When viewed in relation to the other unchallenged evidence introduced by the Commonwealth to establish the "dangerousness" aggravating circumstance, Dr. Pile's testimony concerning the bus incident pales into insignificance.

The Commonwealth introduced evidence that Petitioner had previously been convicted of rape in 1973. Further, the evidence established that Petitioner had been released from the penitentiary and placed on parole from this prior rape conviction on January 25, 1977, not quite four months before he raped and murdered Mrs. Weiler. The jury also had before it Petitioner's confession which contained his statement that he killed Mrs. Weiler because "[a]ll I could think about was going back to the penitentiary. I was afraid she could send me back." (S.A. 7).

Although the prosecutor mentioned the bus incident during argument to the jury, it was hardly the focus of the Commonwealth's case. There were three passing references to this incident in fourteen pages of argument.

The jury also had before it the heinous nature of the offense itself.[12] Under Virginia law the "dangerousness" aggravating circumstance can be proven by reference to the circumstances surrounding the commission of the offense. See § 19.2-264.4C, Code of Virginia. In Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 127 (1982), cert. denied, 460 U.S. ___ (1983), the Court said:

> As to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous

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[12]The jury was instructed to consider the circumstances surrounding the offense when determining the punishment to be imposed. (A. 64).

> circumstances surrounding this homicide, committed upon a 72-year-old woman during the course of robbery. The jury and trial court could properly conclude that if defendant has killed once under these circumstances for the mere purpose of obtaining a sum of money, he is likely to kill again, whether incarcerated or not, for an equally devious purpose.

224 Va. at 151.

This Court has recognized that the admission into evidence of a defendant's confession in violation of the Fifth Amendment can be harmless. In Milton v. Wainwright, 407 U.S. 371 (1972), the Court held that assuming arguendo an involuntary confession was improperly admitted into evidence, such admission was harmless beyond a reasonable doubt when the jury had before it overwhelming evidence of the defendant's guilt. In so holding, the Court made a cogent observation:

> The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

407 U.S. at 377, 378.

Likewise, in Brown v. United States, 411 U.S. 223 (1973), the Court found that the erroneous admission of a co-defendant's extrajudicial confession implicating the defendant in violation of Bruton v. United States, 391 U.S. 123 (1968), was harmless. The Court, upon an independent examination of the record, concluded that the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury.

When examining the present case in light of the opinions of this Court in Milton and Brown, it becomes clear that Dr. Pile's testimony was merely cumulative of the other overwhelming uncontroverted evidence properly before the jury. In view of the

overwhelming evidence of "dangerousness" it is unrealistic to believe the jury in this case would not have found the "dangerousness" aggravating circumstance in the absence of the testimony of Dr. Pile concerning the bus incident.

For this additional reason Petitioner suffered no prejudice by the admission of Dr. Pile's testimony concerning the bus incident.[13]

ARGUMENT

III.

PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL.

This Court rendered a landmark decision in Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984), concerning claims of ineffective assistance of counsel. 104 S.Ct. at 2064. In reviewing claims of ineffective assistance of counsel this Court noted that it was not necessary to address both counsel's performance and prejudice if the petitioner makes an insufficient showing on one. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 104 S.Ct. 2069, 2070. Indeed, this Court suggested that it was not only proper, but usually preferable, to dispose of an ineffectiveness claim under the prejudice prong without even reaching the issue of whether counsel's performance was deficient. Id.

A review of the Petition concerning Petitioner's claim of ineffective assistance of counsel (Petition, p. 33-46) establishes that his claim mainly concerns counsel's performance as it relates to the testimony of Dr. Pile. As previously

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[13]Petitioner claims it is noteworthy that neither the state habeas judge nor the federal magistrate found that Dr. Pile's testimony was not prejudicial. (Petition, p. 32 n. 15). Both the state habeas judge and the federal magistrate held that Petitioner was barred by procedural default from pressing any attack upon Dr. Pile's testimony. Under such a circumstance there was no occasion for either to rule on the prejudice issue.

observed, Dr. Pile's testimony bore only on the question of the "dangerousness" aggravating circumstance. As noted, the "vileness" aggravating circumstance is sufficient in itself to sustain Petitioner's sentence of death, and Petitioner cannot carry his burden of establishing prejudice from any alleged deficiency in counsel's performance. Accordingly, this Court need go no further in reviewing Petitioner's claim of ineffective assistance of counsel.

A. COUNSEL DID NOT FAIL TO PROTECT PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The record establishes that Petitioner's counsel made the decision to seek a psychiatric evaluation by Dr. Pile. Since counsel was aware of the holding in Gibson v. Commonwealth, supra, (S.A. 8), he advised Petitioner on more than one occasion not to discuss prior offenses with anyone. After Petitioner returned from Central State Hospital, counsel again advised him not to make any statements about past offenses.

Counsel is taken to task for not giving Petitioner careful and explicit advice immediately before his examination with Dr. Pile, and not accompanying him to the examination. (Petition, p. 34,35). Counsel testified at the state habeas hearing that in view of the repeated advice he had given Petitioner about not discussing prior offenses with anyone, he believed Petitioner would heed the advice. (S.A. 6). The fact of the matter is that Petitioner did understand this advice from his attorneys. For when Dr. Pile asked Petitioner about prior episodes, Petitioner told Dr. Pile that his attorneys had warned him not to discuss instances which were not related to the present crime. (A. 60). This evidences a clear understanding by Petitioner of the explicit warning given him by his attorneys. There does not appear to be any constitutional right to have counsel actually present during the examination. Estelle v. Smith, 451 U.S. at 470 n. 14, therefore, it is difficult to perceive of what benefit would have been gained by counsel accompanying Petitioner to Dr.

Pile's office.

After Petitioner told Dr. Pile that his attorneys had warned him not to discuss any prior offenses, Dr. Pile did not thereafter press or request any such information. (A. 68). At a later time during the examination, Petitioner voluntarily told Dr. Pile about the bus incident. (A. 68). Counsel exercised reasonable care in advising Petitioner not to discuss prior offenses. With full knowledge of this advice, Petitioner chose to ignore it. Counsel cannot be faulted when a client chooses not to heed his advice.

Additionally, Petitioner asserts that counsel was ineffective in not appreciating the conflict between his advice to Petitioner to remain silent and his efforts to explore possible psychiatric defenses. There appears to exist a conflict within the psychiatric community about the ability of a psychiatrist to make a diagnosis if a defendant declines to discuss his recollection about the circumstances before, during and after the offense. Dr. Dimitris testified that 95% of the defendants he examines either say they don't remember the events or didn't commit the act. (S.A. 9,10). While admitting such information is helpful, it is not essential for diagnostic purposes or the forensic unit would have to be closed. (S.A. 11). Dr. Showalter testified that he could not give an informed opinion in such circumstances. Whatever the resolution of this controversy, it is of no moment. Petitioner, as in the case of prior incidents, chose to ignore the advice of his attorneys and did discuss with the psychiatrists the events surrounding the crime. Petitioner has waived his right to attack the guilt phase of his trial, therefore, the issue of his sanity at the time of the offense is not before the court. Since Petitioner did discuss the circumstances of the offense with the psychiatrists, they were able to have enough information upon which to base an expert opinion regarding mitigation. Regardless of the advice given by counsel, Petitioner has failed to establish actual prejudice.

B. COUNSEL WAS NOT INEFFECTIVE IN THE EXAMINATION OF DR. PILE.

The record establishes that after the prosecutor asked Dr. Pile about the bus incident, Petitioner's attorneys conferred. (S.A. 12). After this conference counsel asked Dr. Pile about his diagnosis. (S.A. 12). Counsel asked Dr. Pile over what period of time this antisocial personality develops, to which Dr. Pile responded "develops around the time of puberty." (S.A. 13). Counsel also developed from Dr. Pile that people, like Petitioner, could be helped in changing a personality, when Dr. Pile testified, "An attempt is made with psychiatric help and maximum security type prison or hospital, to see if something can be done." (S.A. 14). Counsel then developed this evidence into an impassioned plea to save Petitioner's life. Counsel argued,

> Well, this problem that Michael Smith has is not something that he could have helped. Mr. Person (the prosecutor) asked us well, who do we blame? He said, "I blame it on him." At three years of age, at three years of age, Mr. Person -- Mr. Person would have expected Michael Smith to say, "No, I don't want this illness. Take it away. Take it away. I don't want it." What caused this illness? I don't know.

(S.A. 15,16).

In argument counsel stressed that Petitioner's mental condition caused his behavior, and he could be treated:

> I'm asking you to give Michael Smith that opportunity to give Michael Smith the opportunity to have some treatment for this illness. We don't take someone out that has pneumonia or cancer and take him up to Spring Street in Richmond and strap him in a chair and throw thousands of volts to them. We treat them. True, they have not committed a crime. But their illness did not cause them to commit a crime either.
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> * * * *
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> He can be helped, and all we ask you ladies and gentlemen is that you conserve human life, as I believe it is proper. That you conserve his life and allow him the opportunity to be treated for his illness, just as if a person with pneumonia can be treated for theirs.

(S.A. 17-19).

During the state habeas hearing Mr. Pugh testified that he

could not then recall why he asked for Dr. Pile's diagnosis, but did so after a discussion with co-counsel. (S.A. 20).[14]

A reading of counsel's argument makes it patently clear why Dr. Pile was asked for his diagnosis. The only reasonable defense for Petitioner was to attempt to convince the jury that he was suffering from an illness for which he was not responsible, and that such illness could be treated. Without such evidence, counsel could not have made this argument.

On this issue the state court found:

> While petitioner's counsel may have been uncertain at the evidentiary hearing why he questioned Dr. Pile as he did, I find that the trial transcript adequately explains the reasons behind his inquiries. During cross examination of Dr. Pile, petitioner's counsel inquired as to (1) whether sociopaths have compulsions to commit crimes, (2) the causes of the sociopathic personality, (3) the length of time it takes to develop such a condition, (4) whether the condition could be categorized as an emotional illness or sickness, and (5) whether such a condition can be treated. In addition, during his closing statement petitioner's counsel argued that petitioner was suffering from an illness that he could not help and asked the jury to give him the opportunity to obtain treatment, which the Court finds to be reasonable trial strategy in light of the confession of the petitioner and the overwhelmingly aggravating facts exhibited by testimony in the case.
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> * * * *
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> I find that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated. The necessity of placing petitioner's mental state in question, not counsel's incompetence, produced the prejudicial statements.
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> * * * *
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> Furthermore, Dr. Pile's testimony was not entirely prejudicial or void of strategic

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[14] It is to be noted that the state hearing occurred two years after trial, and further that Petitioner was represented by two attorneys, Mr. Pugh and Mr. Wood. Petitioner did not call Mr. Wood to testify at the state hearing, and has offered no explanation as to how Mr. Wood would have testified on this point. See Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983).

> value. On the crucial question of the likelihood of future criminal conduct, Dr. Pile's testimony that in certain cases a sociopathic personality can be treated actually weighed in petitioner's favor. I thus conclude that counsel's cross examination was the product of informed, professional deliberation, and thus competent under the standards discussed supra.

(A. 73-74).

Petitioner challenges these findings as being nothing more than speculation. What Petitioner overlooks, however, is that a habeas court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, ___ U.S.___, 104 S.Ct. at 2065, 2066. The fact that Petitioner's present counsel may have tried the case differently is not the issue. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. 104 S.Ct. at 2066. The record amply supports these findings and Petitioner has failed to overcome the presumption that all significant decisions were made in the exercise of reasonable professional judgment.

In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the court concluded that counsel was not ineffective when he introduced highly prejudicial information in order to establish the only available defense. The Eleventh Circuit refused to find counsel ineffective in his handling of the psychiatric evidence at the sentencing phase of his trial in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). While hindsight might show the attorney's performance was less than stellar, the court can not conclude that it fell below the standard of reasonably effective assistance.

Petitioner also contends that an adequately prepared defense attorney would have had no difficulty impeaching Dr. Pile's

testimony. This assumes, of course, that counsel wanted to discredit Dr. Pile's testimony. The converse is true, however, in that counsel wanted Dr. Pile's diagnosis in order to make the argument to the jury that Petitioner was suffering from a disease which could be treated.

Petitioner makes much of the fact that Dr. Showalter disagreed with Dr. Pile's diagnosis. Dr. Pile, who has been practicing psychiatry since 1946, had examined many persons to determine their sanity at the time of the offense. The fact that he usually testified for defendants led Petitioner's counsel to choose him. Dr. Pile testified that he felt he had sufficient information to render his opinion. Even though Dr. Showalter didn't believe he could have arrived at Dr. Pile's diagnosis based upon the evidence available, he would not commit himself that such a diagnosis couldn't be made. (S. A. 21-22).[15]

That there was some disagreement between the psychiatrists does no more than confirm what this Court found in Ake v. Oklahoma, ___U.S.___, 36 Cr.L. 3159 (1985):

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness.

___U.S.___ at, 36 Cr.L. at 3163.

Based upon this disagreement the state court found that "the expert opinion was equivocal and in basis disagreement." (A. 75), and that counsel was not ineffective for not attacking Dr. Pile's one-hour examination.[16]

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[15]It must be noted that Dr. Showalter has never examined Petitioner, and was not in a position to say whether or not he was a sociopath.

[16]Dr. Dimitris testified at trial that it's possible to make a diagnosis of sociopathy in an hour's examination. He even said it could be done in fifteen minutes if the right material came through.

Petitioner's argument about the predictability about future dangerousness has clearly been rejected in Barefoot v. Estelle, ___U.S.___, 72 L.Ed.2d 1090 (1983).

C. COUNSEL DID CONDUCT AN ADEQUATE INVESTIGATION FOR MITIGATION.

To claim that counsel did not conduct an adequate investigation for mitigation is simply to ignore the record. At the state habeas hearing Dr. Dimitris testified that Mr. Pugh "was very eager to know...[whether there] were any other extenuating circumstances that could be of help to him." (S.A. 23). Dr. Dimitris further testified that "Mr. Pugh showed special consideration in regard to what was the finding. He was not satisfied with the basics. He wanted to go into another facet of his life." (S.A. 24). Dr. Dimitris continued by saying Mr. Pugh wanted to know if there was "any mitigation whatsoever." (S.A. 25).

Petitioner places his entire focus upon the fact that his counsel did not point out to the examining psychiatrists the statutory mental mitigating abnormalities found in § 19.2-264.4, Code of Virginia. Such a position, however, does no more than attempt to exhault form over substance.

During the state habeas hearing, both Drs. Dimitris and Pile testified unequivocally that their respective examinations were sufficiently broad enough to allow them to have formed an opinion on the statutory mitigating factors, and that they did not find either statutory factor.[17] Upon this evidence the state court found:

> The mitigating mental factors to be considered under the statute revolve around petitioner's mental state at the time of the offense, a question on which both examinations focused. On this

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[17]While Dr. Showalter testified that he could not render an opinion on the statutory mitigating factors after an hour's examination, he was unwilling to say that others could not do so. This is nothing more than the familiar disagreement among professionals.

> point, both examining doctors testified that their examinations were sufficient to render an opinion concerning the statutory mitigating mental conditions. I thus find that petitioner was adequately examined with regard to the statutory defense.
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> In addition, in light of the testimonies of the examining psychiatrists that no evidence was found to support a defense of mitigating mental conditions, I find that petitioner suffered no prejudice from counsel's failure to direct the psychiatric examinations toward these issues.

(A. 76,77).

The district court not only found these findings adequately supported by the record, but concluded:

> [N]o proof was offered at the state hearing (even though petitioner's expert psychiatric witness testified at length) nor is it now asserted that an examination conducted by a psychiatrist different from Drs. Pile and Dimitris would develop testimony concerning mitigating mental conditions not found by the psychiatrists who in fact examined petitioner.

(S.A. 26).

The Fourth Circuit has also found that counsel were not ineffective for not specifically directing the psychiatrists to the statutory mitigating factors. (A. 9).

It follows that if counsel failed to perform properly by not specifically pointing out the statutory mitigating factors, Petitioner has failed to establish the necessary predicate of prejudice.

ARGUMENT

IV.

THE JURY INSTRUCTIONS AT THE SENTENCING PHASE WERE CONSTITUTIONALLY SUFFICIENT.

Petitioner's argument with respect to instructions at the

penalty phase is that they established a presumption in favor of the death penalty.[18]

At the sentencing phase the trial court gave two instructions along with the verdict forms. Instruction 1 charged "that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt [one of the aggravating circumstances]. (A. 63) (Emphasis added). This was immediately followed by "you may fix his punishment at death." This instruction then concluded by telling the jury that if it found "that the Commonwealth has failed to prove either [aggravating circumstance] beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment." (A. 63) (Emphasis added).

The trial court also gave Instruction A which told the jury "that when determining the punishment to be imposed...you shall consider...any other facts in mitigation of the offense." This instruction went on to set out the two mental mitigating abnormalities and Petitioner's age as nonexclusive factors to be considered.

These instructions not only mandated that the jury consider mitigating circumstances, but told the jury twice that they were free to impose a life sentence even if they found one of the aggravating factors, or if they found that mitigating circumstances did not justify a sentence of death. The trial court further instructed the jury that they may impose death even if they found an aggravating circumstance. (S.A. 27-31).

Taken as a whole, the instructions leave no doubt that the jury was free to recommend a sentence of life. Courts must

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[18]Petitioner's entire argument on direct appeal was contained in one paragraph, and he only argued that Instruction 1 emphasized the aggravating circumstances. There was no argument concerning his present claims that the instruction unduly restricted the jury's prerogative to return a life sentence or failed to give the jury adequate guidance regarding the circumstances under which it was permitted to return a life sentence. These latter arguments are not properly before this Court as a result of procedural default.

resist the temptation to read jury instructions myopically. In Henderson v. Kibbe, 431 U.S. 145, 154 (1977), this Court stated, "the burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." When a petitioner bases a collateral attack upon an allegedly erroneous instruction, the burden is upon him to demonstrate that the alleged error, by itself, "...so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Petitioner contends that this Court should grant a writ of certiorari to resolve an alleged conflict among the circuit courts of appeal concerning whether jury instructions which define the nature and function of mitigating circumstances are constitutionally required. He contends that the decision of the Fourth Circuit in this case is in direct conflict with decisions of the Fifth and Eleventh Circuits. See e.g., Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 458 U.S. 1111 (1982); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984).[19]

This Court has just recently rejected this very argument in Briley v. Bass, 750 F.2d 1238, (4th Cir. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 1855 (1985). There would appear to be no principled reason to grant certiorari in this case on this issue.

The line of cases upon which Petitioner relies stems from Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). In that case, however, the Court recognized that "[i]n some instances, it will be possible for the judge clearly to instruct the jury so as to guide and focus its consideration of the particularized circumstances of the individual offense and the individual offender without explicitly defining the nature and function of

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[19]Smith's reliance upon Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), and other Fifth and Eleventh Circuit Cases is inappropriate. No such arguments were presented to the Supreme Court of Virginia, and are procedurally barred.

mitigating circumstances...." 661 F.2d at 471 (emphasis added, footnote omitted). As an example of such an instance, the Court cited Jurek v. Texas, 428 U.S. 262 (1976). The Court in Spivey acknowledged that this Court had upheld the sentencing procedure in Jurek, even though under Texas law the jury was given no explicit instructions concerning mitigating circumstances. The Court did so because the Texas procedure, by requiring the jury to determine, among other things, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" necessarily focused the jury's consideration on whatever mitigating evidence the defendant was able to present. Spivey, 661 F.2d at 471 n. 10. This Court's decision in Jurek was premised upon assurances by the Texas Court of Criminal Appeals that the so-called "future dangerousness" factor would be construed "...so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show...." Jurek, 428 U.S. at 272.

Given the fact that Spivey recognized that an instruction defining the nature and function of mitigating circumstances is not constitutionally required in a situation such as that involved in Jurek, there is no logical reason to conclude that such an instruction was constitutionally required in Petitioner's case. As was the case in Jurek, the jury in Petitioner's case was required to determine the "future dangerousness" issue.

In terms of the jury's consideration being sufficiently focused upon mitigating circumstances in the absence of an explicit instruction defining the concept of mitigation, Petitioner's case cannot be distinguished from Jurek in any meaningful way. Thus, by Spivey's own terms, no instruction defining the nature and function of mitigating circumstances was constitutionally required in this case.

CONCLUSION

Each of the arguments asserted by Petitioner has been carefully considered and rejected by the district court and the Fourth Circuit. It is significant that not a single judge of the Fourth Circuit was impressed by Petitioner's argument. The Fourth Circuit has decided the issues in this case in keeping with precedent not only of this Court but with other circuit courts.

There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision. For these reasons the Petition should be denied.

Respectfully submitted,

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